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5/1/1992

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Reply To
Attn. Of: HW-106

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David A. Aggerholm, Manager
Environmental Management
Port of Seattle
P.O. Box 1209
Seattle, Washington 98111

Re: Burlington Environmental Inc., Pier 91 Facility,
EPA Identification Number WAD 00081 2917

Dear Mr. Aggerholm:

This letter is to inform you that the U.S. Environmental Protection Agency (EPA) has made a determination which impacts the scope and schedule of the proposed Pier 91 Resource Conservation and Recovery Act (RCRA) permit for Burlington Environmental Inc. (Burlington) and the Port of Seattle (Port). The definition of "facility" for the proposed permit will include the Port of Seattle property leased by Burlington for the dangerous waste treatment and storage area as well as all contiguous property owned by the Port of Seattle. This definition of facility, to include "all contiguous property under the control of the owner/operator," is consistent with definitions in 40 CFR 260.10 and in the preamble to the proposed rule for Corrective Action for Solid Waste Management Units (55 FR 30798, 7/27/90). This definition was upheld in a U.S. District Court of Appeals decision (*United Technologies Corporation* vs. *U.S. EPA*, 1987) and in a number of administrative permit appeals (see enclosed decisions to RCRA Appeals 90-9 and 90-9a).

EPA recognizes that the proposed permit definition will greatly expand the facility area in relation to the portion leased by Burlington (which is how the facility is defined in the existing Consent Agreement with Burlington). To the best of our knowledge, this "facility" definition will encompass approximately 124 acres and include Terminals 90 and 91. In light of this fact, and after considering the administrative options, EPA has decided to withhold the federal portion of the proposed permit until EPA has completed a RCRA Facility Assessment (RFA) for the entire facility. This approach allows EPA to obtain a more complete understanding of potential

contamination issues at the facility and provides more opportunity for the Port of Seattle to provide input to the process prior to public notice of the corrective action permit. This decision will not necessarily affect the permit schedule for the Washington Department of Ecology's portion of the permit.

To complete the RFA, EPA must assess any past releases of hazardous waste or hazardous constituents from any active or closed solid or hazardous waste management unit(s) on the facility property. While EPA has obtained this information for the portion of the property leased by Burlington, EPA does not have similar information for the rest of the Port of Seattle property. In order to obtain this information, the Port of Seattle as property owner, is hereby requested in accordance with Section 3007 of RCRA to submit the following information on the Pier 91 facility:

1) For all solid and hazardous waste management units on the property (including landfills, storage facilities, waste accumulation areas, waste piles, sumps, surface impoundments, wastewater treatment units, injection wells, transfer facilities, loading and unloading areas, resource recovery facilities, and any other waste handling operation), provide a brief assessment of the potential for a spill or release from the unit, and identify all known past and present releases and spills of waste material. Include both hazardous and solid wastes. Give the approximate dates and locations of each spill or release, and any cleanup operations which have occurred relative to these incidents. This should include, but not be limited to, all information and studies regarding the leaking Pacific Northern Oil Company pipelines and the discovery of product in groundwater wells west of the small tank storage yard.

2) List the approximate dates and locations of product spill leaks, releases, and drippings (other than into a product tank) which have occurred or are occurring at the facility, and any cleanup operations which have occurred relative to these incidents.

3) Identify all areas on the facility property where any products or wastes have been buried, impounded, spilled, or leaked.

4) For all items identified above, describe the composition of the material, the process or activity from which it resulted or which it was used, and any other pertinent information such as a physical description of the unit.

All facility records should be reviewed in obtaining the requested information, including the personal recollection of

longtime employees and past owners and operators. A facility owner who fails to provide information requested under Section 3007 violates the law and may be subject to enforcement action, including administrative penalties, under Section 3008 of RCRA.

This information should be certified in accordance with 40 CFR 270.11, and sent to Michael F. Gearheard, Chief, Waste Management Branch, HW-102, Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington, 98101, within forty five (45) calendar days of receipt of this letter. A copy should also be sent to Cindy Gilder, Supervisor, Hazardous Waste Permits, Washington Department of Ecology, Mail Stop PV-11, Olympia, Washington, 98504-8711.

If you have any questions regarding this matter, please contact David Croxton of the EPA at (206) 553-8582.

Sincerely,

Randall F. Smith, Chief
Waste Management Division

Enclosure

cc: John Stiller, Burlington
Cindy Gilder, Ecology
Galen Tritt, Ecology-NWRO

CONCURRENCES	CROXTON	SIKORSKI	GEARHEARD
	DC 4/23/92	DBB 4/23/92	MFG 4/24/92

D. Michael

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of: Ford Motor Company Applicant Permit No. MOD048090633	RCRA Appeal No. 90-9
In the Matter of: Michigan Disposal, Inc. and Ford Motor Company Applicants Permit No. MID000724831	RCRA Appeal No. 90-9A

ORDER DENYING REVIEW

This decision consolidates appeals of two RCRA permits, issued by U.S. EPA Region V, relating to separate hazardous waste facilities. One facility is owned and operated by Wayne Disposal, Inc. ("Wayne"), and one is owned and operated by Michigan Disposal, Inc. ("MDI"). These appeals have been consolidated because they raise a common legal issue regarding Ford Motor Company's status as a permittee on the two permits.

By separate petitions, both dated May 1, 1990, MDI and Ford each seek review of the permit relating to MDI's facility. As requested by the Agency's Chief Judicial Officer, Region V filed a response to these petitions dated June 25, 1990. By a petition dated May 1, 1990, Ford also seeks review of the RCRA permit

relating to Wayne's facility. [1/] As requested by the Agency's Chief Judicial Officer, Region V filed a response to this petition dated June 25, 1990. MDI and Ford have filed replies to the Region's responses.

Under the rules that govern this proceeding, a RCRA permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. See 40 CFR §124.19; 45 Fed. Reg. 33412 (May 19, 1980). The preamble to Section 124.19 states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional level * * *." Id. The burden of demonstrating that review is warranted is thus on the petitioners. The petitioners in this case have not carried that burden.

I. Ford's Status as a Permittee

Pursuant to a license agreement, Ford has allowed Wayne to use land owned by Ford to construct and operate a waste disposal facility. Under the agreement, the buildings and improvements on the land are the personal property of Wayne and are to be removed at the termination of the license period unless they are being used to satisfy closure and post-closure requirements. Ford is not involved in the operation of the facility in any way. Ford's

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[1/] Wayne Disposal, Inc. also filed a petition for review, but later withdrew it pursuant to a settlement agreement with Region V.

relationship to Wayne's facility is, for purposes of this case, identical to Ford's relationship to MDI's facility. The petitions raise the issue of whether, under the circumstances outlined above, Ford should be named as a permittee on the two permits.

Petitioners argue that, under such circumstances, Ford should not be named as a permittee because Ford is not an owner of the facility. And even if Ford should be deemed an owner of the facility, Petitioners contend that Ford is not required to be a permittee because the facility is operated by another person (Wayne or MDI). Petitioners assert that, when the facility is owned by one person and operated by another person, the owner is required to sign the permit application but is not required to be a permittee. For the following reasons, I conclude that petitioners' arguments are baseless and that the issue does not merit review.

In each case, it is beyond serious dispute that the real property owned by Ford is part of the facility in question. The term "facility" is defined as "all contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." 40 CFR §260.10 (1990) (emphasis added). Petitioners argue that Ford's land is not being "used for treating, storing, or disposing of hazardous waste." I disagree. In common usage, land is deemed to be "used" for whatever activities are conducted on the land, even if the activities take place inside buildings

on the land. This conclusion is confirmed by Ford's own petition, which states that "Ford has allowed Wayne to use land owned by Ford in Belleville, Michigan to construct and to operate a waste disposal facility in accordance with government laws, orders, rules and regulations." (Ford's Wayne Petition, at 2) (emphasis added). Clearly, Ford's land is part of the "facility," and, under the rules, a person who owns part of a facility is deemed to be the owner of the facility. See 40 CFR §260.10 (1990) ("Owner" defined as "the person who owns a facility or part of a facility.") (emphasis added). In light of these considerations, I conclude that Ford is an owner of the facility.

Petitioners argue, however, that even if Ford is deemed to be an owner of the facility, Ford is not required to be a permittee because another person (Wayne or MDI) operates the facility. In support of this argument, Petitioners rely on 40 CFR §270.10(b), which provides as follows:

> Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application.

40 CFR §270.10(b) (1990). Petitioner's argue that, under Section 270.10(b), Ford is required to sign the permit, but only the operator (Wayne or MDI) is required to be a permittee.

The same argument was raised and rejected in Hawaiian Western Steel, Ltd., Inc. and James Campbell Estate, RCRA (3008) Appeal No. 88-2 (Nov. 17, 1988) (Order Denying Petition for Reconsideration on Interlocutory Appeal) (a RCRA penalty case).

In that case, then-Administrator Lee M. Thomas explained that Section 270.10(b) is meant only to relieve the owner of responsibility for filing a separate permit application. Id. at 6. Administrator Thomas made it clear that Section 270.10(b) "in no way excuses an owner from having a permit, an obligation that flows implicitly from the act of signing the permit application and explicitly from the commands of Section 270.1(c)." Id. at 7 (emphasis added). Section 270.1(c) provides that "[o]wners and operators of hazardous waste management units must have permits during the active life * * * of the unit." 40 CFR §270.1(c) (1990) (emphasis added). Administrator Thomas observed that the language of Section 270.1(c)

> fully implements the mandate of Section 3005(a) and clearly suffices to hold an owner, such as the Estate, liable for failure to have a permit. This much is beyond dispute.

Hawaiian Western, at 4.

Petitioners nevertheless believe that "the original intent of [Section 270.10(b)] was to relieve owners of land from being named as co-permittees." (Reply Brief, at 2) (emphasis in the original). In support of this belief, petitioners cite the preamble that accompanied the adoption of Section 122.4, a precursor of Section 270.10(b). The part of the preamble quoted by petitioners reads as follows:

> Some commentators sought clarification of what happens when the owner and operator are not the same, and expressed concern that requirements of the permit program might, by virtue of this definition, be imposed on landowners who have no involvement in operation of a permitted activity. To address this concern, we have amended §122.4, application for a permit, to provide

> that the operator is responsible for obtaining a permit and complying with it when ownership and operation are split. However, RCRA applications must be signed both by the owner and operator.

45 Fed. Reg. 33295 (May 19, 1980). Petitioners have seriously distorted the meaning of the quoted passage by taking it out of context. When read in context, the passage means the exact opposite of what petitioners say it means. Section 122.4, referred to in the quoted passage, covered applications not just for RCRA permits, but for other types of permits as well. 40 CFR §122.4 (1980) (UIC and NPDES). With respect to those other types of permits, Section 122.4 did relieve the owner of responsibility for complying with the permit in cases where the facility was operated by another person. With respect to RCRA permits, however, Section 122.4 did not relieve the owner of that responsibility. Instead, Section 122.4 required the owner of a RCRA facility to sign the application and made the owner subject to the requirements of the permit. That Section 122.4 was not meant to relieve owners of responsibility under RCRA permits is made perfectly clear in the very next sentence after the passage quoted in petitioners' brief, which reads as follows:

> The requirements of a RCRA permit bind both the "owner" and the "operator" of the permitted facility, while the requirements of other permits subject to this Part bind only the permit holder.

45 Fed. Reg. 33295 (May 19, 1980). It is made even clearer two paragraphs later:

> To ensure that both the owner and the operator understand their joint responsibility [under a RCRA permit], EPA is requiring both the owner and the operator to sign the permit application.

Id. And still clearer a few sentences later:

> EPA anticipates that in most cases the operator will take the lead role in complying with all but the few conditions that only the owner can satisfy. The owner is free to make arrangements with the operator by contract or otherwise to assure itself that the operator will take most actions necessary for compliance activities beyond that. Nonetheless, EPA considers both parties responsible for compliance with the regulations.

Id. (emphasis added). Another part of the same preamble explains that the RCRA regulations are meant to apply to absentee owners like Ford:

> Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility. Therefore, to ensure their knowledge, the Agency will require owners to co-sign the permit application and any final permit for the facility.

Id. at 33169. Thus, petitioners' characterization of the regulatory history of Section 270.10(b) is seriously misleading. The regulatory history clearly supports the conclusion that Ford, as the absentee owner of the facility, should be named as a permittee.

The regulations requiring absentee owners to become permittees faithfully implement Congressional intent. As EPA's Chief Judicial Officer pointed out in Arrcom, Inc., RCRA (3008) Appeal No. 86-6 (May 19, 1986), the express language of RCRA reflects Congressional intent to impose RCRA requirements on both owners and operators of facilities. Section 3004 of RCRA directs the Administrator to promulgate regulations "applicable to owners

and operators of facilities for the treatment, storage or disposal of hazardous waste * * *." 42 U.S.C. §6924 (emphasis added). Section 3005(a) of RCRA provides, without qualification, that

> the Administrator shall promulgate regulations requiring each person owning or operating an existing facility or planning to construct a new facility for the treatment, storage, or disposal of hazardous waste * * * to have a permit issued pursuant to this section.

42 U.S.C. §6925 (a). Thus, Congress clearly intended to subject absentee owners to liability under RCRA. [2/]

II. Other Issues in MDI's Petition

In addition to the issue relating to Ford's status as a permittee, MDI raises two issues in its petition, relating to: (1) the requirement that permittees test pre-acceptance samples of waste more than once a year, and (2) the requirement that the permittees conduct a facility investigation to identify all solid waste management units and all releases of hazardous constituents and to perform corrective action if necessary, even though MDI's facility is completely surrounded by Wayne's facility and Wayne

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[2/] Ford argues that requiring it to be a permittee is unduly burdensome because, under its agreement with the operator (Wayne or MDI), Ford does not have the right to take actions that are necessary to comply with the permit. Ford argues that it "should not be placed in jeopardy of violating the law by action or inaction of another party unrelated and uncontrolled by Ford." (Ford Reply Brief, at 4). Ford's real quarrel is with the regulations. If Ford has been placed in jeopardy, it is the regulations that have placed it there. Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations.

will conduct an investigation of the whole area. Only the first issue is discussed below. With respect to the second issue, for the reasons set forth in the Region's response to MDI's petition, I conclude that MDI has failed to show that the Region's permit decision is clearly erroneous or otherwise warrants review.

MDI seeks review of Condition B.5. of the Waste Analysis Plan in the permit. Condition B.5. requires MDI to test samples of waste to be treated at its facility. Specifically, MDI challenges the frequency with which this testing must be performed. Condition B.5. provides as follows:

> Samples of each waste stream received by the Permittees shall be evaluated and analyzed to determine if they are restricted from land disposal. Samples shall be representative pre-acceptance samples, taken before shipment, and shall be tested according to the following schedule:
>
> | Waste Shipments Per Year | Testing Schedule Per Year |
> |---|---|
> | 1-4 Shipments | No confirmation testing. Generator data must be accurate and reported. |
> | 5-10 Shipments | 1 Confirmation Test/Year |
> | 11-30 Shipments | 2 Confirmation Tests/Year |
> | >30 Shipments | 4 Confirmation Tests/Year |

(Permit Attachment I, Condition B.5.)

The regulatory authority for Condition B.5. is Section 264.13. That section requires the owner or operator of a treatment facility to "obtain a detailed chemical and physical analysis of a representative sample of the wastes" to be treated at the facility. 40 CFR §264.13(a)(1) (1990). The analysis must be performed before the owner or operator treats the waste. Id. Under Section 264.13(a)(3), "[t]he analysis must be repeated as

necessary to ensure that it is accurate and up to date." 40 CFR §264.13(a)(3) (1990) (emphasis added). [3/]

MDI believes that it is unnecessary to link the frequency of testing to the number of shipments received by the treatment facility from a particular generator. [4/] The testing schedule in

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[3/] Counsel for the Region reads Condition B.5. as implementing the inspection requirement of paragraph (a)(4) of Section 264.13, which provides as follows:

> The owner or operator of an off-site facility must inspect and, if necessary, analyze each hazardous waste movement received at the facility to determine whether it matches the identity of the waste specified on the accompanying manifest or shipping paper.

40 CFR §264.13(a)(4) (1990). I believe counsel has misunderstood what the permit writer intended. The purpose of the inspection and, in some cases, analysis required by paragraph (a)(4) is "to determine whether [each waste shipment] matches the identity of the waste specified on the accompanying manifest or shipping paper." In contrast, Condition B.5. states that the purpose of the waste analysis is "to determine if [the samples] are restricted from land disposal." Moreover, Paragraph (a)(4) emphasizes conducting an inspection of each hazardous waste shipment received at the facility, whereas an actual analysis of the waste is not required unless the results of the inspection suggest that one is necessary. In contrast, Condition B.5. says nothing about inspections and requires an analysis at regular intervals. In light of these considerations, I believe that Condition B.5. is more easily read as implementing paragraphs (a)(1) and (a)(3), rather than paragraph (a)(4).

[4/] In its response to MDI's petition, the Region states that, under Condition B.5., "generators who send eleven to thirty waste shipments to MDI within a year must perform pre-acceptance sampling semiannually; generators who send more than thirty waste shipments to MDI within a year must perform pre-acceptance sampling on a quarterly basis." (Region's Response to Petition, at 11) (emphasis added). MDI believes that this statement is misleading because Condition B.5. imposes duties on MDI, and not on the generators of the waste. MDI is correct in believing that it is ultimately responsible for seeing that the testing required by Condition B.5 is performed. But I do not believe the Region meant to imply otherwise. In all probability, the Region was only trying to communicate the idea that the number of waste

(continued...)

B.5. is based on the assumption that the more shipments the facility receives from a particular generator, the more testing the facility should do. MDI argues that "the number of shipments from a generator is not rationally connected to the need for a waste analysis * * *." (MDI's Reply Brief, at 6.) I disagree. It seems reasonable to conclude that, as the number of shipments increases, so too will the likelihood of a change in the consistency of the hazardous waste. To ensure that the analysis is accurate and up-to-date, therefore, the number of tests should also increase. Thus, MDI has not carried its burden of showing that the frequency of testing prescribed in Condition B.5. is clearly erroneous or otherwise warrants review. [5/]

[4/](...continued)
shipments from a generator in a given year determines the frequency of the required testing.

[5/] In its challenge to Condition B.5., MDI also challenges Condition II.A.4., treating the two as one condition. Condition II.A.4. also requires MDI to perform waste analysis, as follows:

> The Permittees must test the wastes, or extracts of the wastes or treatment residues to assure that wastes, extracts or treatment residues are in compliance with the applicable treatment standards set forth in 40 CFR Part 268, Subpart D and all applicable prohibitions set forth in 40 CFR Part 268, Subpart C or in RCRA Section 3004(d). Such testing must be performed according to the frequency specified in the Permittee's Waste Analysis Plan (Attachment I) as required by 40 CFR §264.13.

Because the testing required by Condition II.A.4. must be done according to the schedule set out in Condition B.5., MDI apparently assumed that Condition II.A.4. and Condition B.5. are really just different parts of the same condition. But that is not the proper way to read them. The two provisions are separate conditions implementing different waste analysis requirements in the rules. As discussed in the text, the regulatory authority (continued...)

III. Conclusion

Petitioners have not shown that the decision to name Ford as permittee or the decision to include the contested conditions in MDI's permit are clearly erroneous. Nor have they shown that this case involves important policy issues that warrant review. Accordingly, the petitions are hereby denied.

So ordered.

William K. Reilly
Administrator

Dated: OCT 2 1991

5/(...continued)
for Condition B.5. is Section 264.13. Condition II.A.4., on the other hand, is based on the waste analysis requirement of Section 268.7(b), which requires treatment facilities to test their wastes after treatment. The purpose of the testing required under Section 268.7(b) is to ensure that the treated waste meets the treatment standards and prohibitions of Part 268, which contains restrictions on land disposal. 40 CFR §268.7(b) (1990). Under Section 268.7(b), treatment facilities must perform the tests "according to the frequency specified in their waste analysis plans as required by §264.13 or §265.13." Id.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Ford Motor Company, RCRA Appeal No. 90-9 and Michigan Disposal, Inc., RCRA Appeal No. 90-9A, were sent to the following persons in the manner indicated:

By First Class Mail,
Postage Prepaid:

James E. Morris
Assistant Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
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George Kircos
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Dearborn, MI 48126

John W. Voelpel
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, MI 48226-3583

Dated: OCT 09 1991

Mildred T. Connelly, Secretary
to the Judicial Officer